No. 96-1558 (3)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

LOUIS SILVERMAN, DIANE SILVERMAN,
URBAN SEARCH MANAGEMENT
and DEVELOPMENT MANAGEMENT GROUP, INC.
Petitioners,

v.

THOMAS WALKER, ANTHONY TYUS, HOPE FAIR
HOUSING, INC., LEADERSHIP COUNCIL
FOR METROPOLITAN OPEN COMMUNITIES;
INTERFAITH HOUSING CENTER and
SOUTH SUBURBAN HOUSING CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. WHETHER MITIGATION OF DAMAGES PRINCIPLES APPLY IN THE FAIR HOUSING CONTEXT RAISES COMPETING POLICY CONCERNS, AND IS AN IMPORTANT QUESTION WHICH SHOULD BE DECIDED BY THIS COURT[1]

Respondents do not contest that whether mitigation of damages applies in Fair Housing Act cases is an important question that raises significant policy concerns.[2] Nonetheless, in an effort to avoid review of that question in this case, respondents claim, first, that, as a procedural matter, the issue does not arise in this case because, according to respondents, there was no proof at trial that plaintiffs had failed to mitigate their damages (Opp. at 4-6); and second, that the Seventh Circuit's decision is "consistent" with other decisions on mitigation of damages. (Opp. at 6-8) Neither argument has merit.

As to the first, the district court found that there was sufficient evidence to justify giving a mitigation of damages instruction. The plaintiffs testified that they attended weekly meetings over a three year period to "monitor" the allegedly discriminatory advertisements, and that they incurred legal and other expenses in connection with this monitoring process. Had they notified the defendants of their belief that the ads were offensive, or had they commenced their

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[1] The disclosure statement required by Rule 29(6) of the Rules of the Court was included in the Petiton at p. ii.

[2] The relevant portion of the Fair Housing Act, 42 U.S.C. § 3604(c), is reproduced in the Petition at pages 1-2.

lawsuit earlier, their damages would have been minimized.

Based on the plaintiffs' own testimony, the district court correctly concluded that there was sufficient evidence for a jury to be given a traditional charge on mitigation of damages. The Court of Appeals did not dispute the district court's factual determination that the evidence supported a mitigation instruction. Instead, the Court held, as a broad principle of law, that, under the Fair Housing Act, "mitigation is not required for intangible losses or organizational claims." (App-12)

Respondents next argue that this principle does not break new ground because no case has ever required plaintiffs to give notice before bringing suit, or to avoid the offensive advertisements in order to prevail. But the mitigation instruction in this case did not charge the jury that plaintiffs were required to notify the defendants, and it did not charge the jury that plaintiffs could not prevail because they took no steps to shield themselves from the allegedly harmful conduct.

The instruction at issue in this case (reproduced in the Petition at App-23) addressed damages only. It made crystal clear that plaintiffs could not recover for damages they could have avoided with reasonable care, and it placed the burden of proving "the damages which plaintiffs could have mitigated" on the defendants. (App-23) Thus, unless, as a matter of law, Fair Housing plaintiffs are exempt from traditional mitigation requirements, the instruction itself was appropriate.

Respondents seem to believe that because they did not prevail at trial, the jurors must have misinterpreted the mitigation instruction to address liability and not damages. Not only this there no basis for that assumption, it is not reason for this Court to avoid review of an otherwise substantial question.

Respondents also suggest that, because of the supposedly unique nature of claims based on discriminatory advertisements, there are policy reasons for excusing Fair Housing plaintiffs from traditional mitigation requirements. (Opp. at 7-8) Petitioners have argued that there are compelling policy reasons for adhering to well-established law -- that, in fact, mitigation advances rather than impedes the goals of the Fair Housing Act. (Pet. at 11-12)

The Seventh Circuit adopted the respondents' view and its decision is likely to be influential. The fact that there are competing policy concerns is yet another reason why the issue is important and is deserving of this Court's review.

II. THIS CASE CLEARLY PRESENTS THE CONFLICT IN THE CIRCUITS ON THE HARMLESS ERROR STANDARD IN CIVIL CASES

The respondents do not dispute that the Circuits are hopelessly in conflict over the proper standards to apply in determining harmless error in the civil context. Instead, the respondents argue that this issue was not raised in the Seventh Circuit so this Court should not address it now. (Opp. at 12-13) In their brief to the Court of Appeals, petitioners argued that each of the challenged errors was harmless. The fact that the Seventh

Circuit chose to apply a particular harmless error standard (and one that eviscerates the harmless error concept), does not insulate the question from this Court's review.

Next, the respondents claim that the Seventh Circuit applied the strictest standard so the outcome of the case would be the same regardless of what standard was applied. (Opp. at 13-14) Respondents misunderstand the meaning of "strictest" and "loosest" in this context. The so-called strictest standard is the standard that is used in criminal cases, and that makes it more likely, not less likely, that an error will not be considered harmless. Although a number of Circuits have adopted the criminal standard, several Circuits have expressly rejected that standard in civil cases, determining that, because of the lower burden of proof in civil cases, a less strict standard should be applied, and one that is less likely to result in a reversal of the jury verdict. (Pet. at 14-15)

In this case, the Seventh Circuit went even further than the criminal standard and held that reversal was warranted if the verdict "may have been influenced" by any one of the alleged instructional errors (App-11), a standard so strict that it virtually compelled reversal once an error was found. Moreover, the Court did not even engage in a harmless error analysis before determining that a new trial was warranted because of the exclusion of the expert witness, Dr. John Tarini. (App-8-11)

Finally, respondents claim that because the Seventh Circuit found several errors in the evidentiary rulings and instructions, the jury verdict would be

reversed under any standard. (Opp. at 14) That also is untrue. The Seventh Circuit reversed as to three of the defendants -- Diane Silverman, and the two corporate defendants -- even though the jury found that those defendants were not responsible for the allegedly discriminatory advertisements. None of the alleged errors resulting in reversal went to the factual question of who bore responsibility for the challenged advertising campaign. The excluded expert would have testified about the nature of plaintiffs' alleged injuries, and not the individual responsibility of each of the separate defendants, and the allegedly erroneous instructions went to the measure of damages only. Had a different and less stringent harmless error standard been employed, the result (at least as to Diane Silverman and the corporate defendants) undoubtedly would have been different.

As respondents concede, the Circuit Courts have differed on what standard should be used in evaluating the impact of an error in a civil case. To the extent the Seventh Circuit engaged in any harmless error analysis in this case, it used, we submit, the wrong standard. The conflict should be resolved by this Court.

III. THE PETITION SHOULD BE HELD PENDING RESOLUTION OF GENERAL ELECTRIC v. JOINER

Respondents argue that no matter how this Court decides General Electric v. Joiner, No. 96-188 (March 18, 1997), granting certiorari to, 78 F.3d 524 (11th Cir. 1996) it would have no impact on the Seventh Circuit's evaluation of the propriety of the district court's exclusion of the expert witness, Dr. Tarini. Respondents cannot fairly make that claim.

The Seventh Circuit did not posit any standard of review in reversing the jury verdict on the basis of the lower court's decision to exclude Dr. Tarini. Certainly, it did not apply deference to the district court's ruling, ignoring entirely the court's conclusion that the expert lacked the qualifications necessary to testify about "the particular question he [was] being offered on." (R.270-1, p.298, 302)

In Joiner, this Court will examine the proper standard of appellate review of a trial court's decision excluding expert testimony. If the Court determines that the type of de novo review engaged in by the Seventh Circuit in this case is improper, this case should be remanded so that the Court can review the issue employing the proper standard of review. The Court, therefore, should hold this petition until Joiner is resolved.

IV. THE OTHER ALLEGED ERRORS ARE EITHER RAISED IN THE PETITION OR DO NOT MILITATE AGAINST GRANTING THE PETITION

As a final point, respondents argue that a grant of certiorari should be denied because no matter how this Court decides the questions presented, reversal of the jury verdict would still be warranted. There are several problems with this argument.

First, if this Court were to decide that traditional mitigation of damages principles are applicable in the Fair Housing context, even if a new trial were to take place, the defendants would be entitled to a mitigation instruction if the evidence, at retrial, warranted it. Thus, the issue remains important regardless of whether the Seventh Circuit's decision

reversing the jury verdict is upheld on other grounds.

Second, since petitioners have challenged the entire Seventh Circuit ruling on the ground that the Court employed the wrong standard of appellate review, if this Court were to agree that a less stringent standard of harmless error is proper, the Court would presumably vacate the Seventh Circuit's opinion.

The Court might then conclude that the challenged errors were harmless as a matter of law and affirm the jury verdict. Or the Court might determine that a remand is necessary so that the Seventh Circuit can reconsider the case in light of this Court's opinion. Often, after certiorari is granted, there is a remand to the Court of Appeals with that type of instruction. On remand, the Court of Appeals may reach the same conclusion as it did the first time it reviewed the case. But that is not a reason to deny certiorari in the first instance.

Finally, the Seventh Circuit did not decide that a new trial was warranted because of the alleged improprieties of the trial judge or of trial counsel. Those issues are irrelevant to the outcome of this Petition and are not before this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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